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No. 365

In the Supreme Court of the United States

October Term, 1958.

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, *nee* Wright, and Mary Ellen Cash, *Respondents*.

REPLY BRIEF.

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REPLY BRIEF

It is difficult to conceive of cases more clearly evidencing departure from the accepted and usual course of judicial procedure, and denial of due process of law than in the two separate cases complained of herein, in each of which Aetna and the interveners were each and all granted two separate injunctions to accomplish a single object and purpose, *viz.*, to summarily enjoin this appellant from prosecuting cause No. 87402 in the District Court of Tulsa County, Oklahoma.

Careful examination of the briefs of respondent Aetna, (the plaintiff in each of said cases) and of intervener Francis X. Rettenmeyer, executor of the estate of Joseph A. Rettenmeyer (who alone of the many interveners has filed a response), confirms and buttresses rather than disproves the basic grounds relied upon for issuance of the writ of certiorari.

These briefs admit and concede that the injunctions were issued without evidence. At page 51, Aetna premises an otherwise irrelevant statement by the express words "although there was no evidence introduced * * *."

The petitioner, Fleming, respectfully urges this Court to note that nowhere is there *evidence or pleadings* to refute or modify Aetna's own exhibit (included photostatically at the last page of the petition for certiorari herein). His signing this exhibit and the issuance by Aetna of its policy based thereon constitutes the sole and only transaction which constituted any shadow of a basis for any cause of action in interpleader in the federal court. The exhibit discloses that when petitioner was 11 years old, he signed an application to Aetna Life Insurance Company for a single premium, fifteen year endowment policy, under the terms of which if he was living at the end of fifteen years and the policy had not been earlier surrendered for cash by Joseph A. Rettenmeyer, the company would become obligated to pay petitionr $33,000 in monthly installments.

The policy was to be payable in event of the death of petitioner to Joseph A. Rettenmeyer, a step-great-uncle who was described as "uncle" in the application.

The application recited that the single premium of $25,143.05 was to be paid from the funds of Rosa B. Wright Rettenmeyer by Joseph A. Rettenmeyer, "Atty. in Fact." There is no allegation that Fleming was consulted in regard to how, when or by whom this premium was to be paid.

The signature of the applicant was witnessed by F. E. Pence, Agent of Aetna. The application was dated Oct. 9, 1950.

There is positively nothing in the application to indicate that the premium on this policy was to be paid from registered United States Bonds then safely secreted in the private safety deposit box of Rosa B. Wright Rettenmeyer, whose mental and physical condition was such that, as the briefs concede and the application, shows her affairs actually were being conducted, not by her in person, but by "Joseph A. Rettenmeyer, Atty. in Fact."

The circumstance that with Rosa B. Wright Rettenmeyer mortally ill, Joseph A. Rettenmeyer would be using her funds to insure the life of petitioner for J. A. Rettenmeyer's own benefit and advantage in itself should be sufficient to raise doubts concerning his rights to injunctive relief in equity in any subsequent litigation growing out of that transaction.

Provisions in the policy issued, vested in Joseph A. Rettenmeyer authority to reclaim substantially the whole of this premium at his pleasure, at any time before its maturity.

Under Oklahoma law, a transaction by a trustee or agent whereby he derives benefit at the expense of the principal or *cestui que trust* is presumed void.

> "No trustee shall directly or indirectly buy or sell any property for the trust * * * from or to himself, a relative, employer, partner, or other business associate * * *." 60 O. S. A. 175.11

J. A. Rettenmeyer was not only acting as agent and trustee under Power of Attorney; he was also husband of Rosa B. Wright Rettenmeyer and as such dealing with her separate estate. The transactions by virtue of this relationship are also voidable.

Johnston v. *McCray*, 122 Okl. 301, 254 Pac. 979;
Weitz v. *Moulden*, 109 Okl. 119, 234 Pac. 583;
McDaniel v. *Schroeder*, 128 Okl. 91, 261 Pac. 224;
Teague v. *Murphy*, 91 Okl. 116, 216 Pac. 475.

The application was dated Oct. 9, 1950 and Aetna issued its policy conformable thereto. *That this transaction was complete—the policy executed and delivered before the conversion (Oct. 31, 1950) complained of in state court suit No. 87402 occurred is clear from the pleadings and the briefs.*

Nothing, whatever, justifies an inference that petitioner, an eleven-year-old school boy, then agreed or consented or knew that $191,864.64 in value of bonds, then in the private safety deposit box of his testatrix, and in which he had under her will a contingent interest, were to be withdrawn, endorsed by someone with an "X" and the proceeds used in part to provide further benefits to Joseph A. Rettenmeyer in the sum of $1,000.00 per month for life, as well as contingent benefits to his own heirs in event of his death.

The briefs of both respondents are devoted largely to efforts to supply evidence which admittedly was never offered at the trial. The briefs fail to explain in what manner or by what process of reasoning it was decided that Aetna and the interveners were all entitled to injunctions preventing petitioner from prosecuting cause No. 87,402 for damages for wrongful conversion of assets of the estate of petitioner's testatrix.

No payment had been made or tendered by Aetna to anyone under the only policy which provided even contingent benefits to this petitioner.

No one other than petitioner who might have asserted an interest in this policy was a party to either suit in the federal court. There was, therefore, no possible ground of jurisdiction in interpleader in the federal court in either suit in favor of Aetna or the interveners since no question of *double liability* or conflicting claims was involved.

Petitioner, as the record and briefs show, was neither directly nor indirectly a party to any other policy contract with Aetna than that issued conformable to the application of Oct. 9, 1950.

Both respondents in their briefs attempt to supply lack of evidence by garbled and incomplete excerpts from statements and admissions of the petitioner's attorneys. The most casual examination of these statements will clearly show that at no time was any statement made under any condition calculated to, which did or could forfeit the rights of this petitioner, who is still a minor and under guardianship, to prosecute the suit for damages which he had filed and which remains pending in the state court.

The contention that statements of counsel at sometime in the long course of this litigation in the federal court constitute an admission, and waiver of necessity of proof is clearly an afterthought.

This may be readily determined by examination of the record of proceedings at the pre-trial, as printed and set forth in the brief of respondent Aetna. After a long and tedious recitation of what he claimed evidence would be introduced to prove, Aetna's attorneys declare:

> "Then a colloquy took pace between the court and Mr. Young in which the court reviewed the litigation and the contentions of the parties (R. 5620 p. 134:

> > 'The Court: * * * And it has been my intention in entering the orders that have heretofore been entered to require the parties who are defendants here, who are among the beneficiaries of the annuity contract and who are likewise plaintiffs in the suit pending in the District Court of Tulsa County, to assert here in this court, if they choose to do so, whatever claims they may have, not only against the Aetna, but against the other parties defendant in the pending case in the District Court of Tulsa County.

> > 'Now, of course I cannot require the parties to assert the claim here. I can only require that the claim be asserted here, or otherwise suffer a ruling to be made by the court which would in my judgment be *res adjudicata*, with respect to the

issues joined now in the District Court of Tulsa County'."

Surely there's nothing herein to indicate that statements and admissions of petitioner's attorneys were considered to obviate need for evidence or constitute waiver of proof as well as pleadings. Suggestion that a judgment would be "*res adjudicata*" clearly evidences a purpose of the United States District Court to decide issues in cause No. 87,402.

The U. S. District Court specifically recognized that *no pleading by any party in either case in the federal court invoked jurisdiction of the federal court to decide cause No. 87,402*:

> "Now I note from the answers filed by our clients —on behalf of your clients, Mr. Young, that there is apparently no attempt to join issue here in this case on the alleged cause of action plead and asserted in the District Court of Tulsa County. It appears to me that the answer filed on behalf of your clients is intended to reassert, reallege, and restate the position that you have taken all along, that this Court has no jurisdiction to pass upon the issues which are joined between the parties in the District Court of Tulsa County."

After further discussion, the court said:

> "And it is further my view that if you dont tender the issue here and litigate it here that it will be necessary for this court to enter a judgment which will attempt to foreclose you with respect to that issue." (Aetna's brief, page 33)

With further regard to respondent's present contention that the pleadings and statements of counsel constituted

admissions justifying a judgment in the federal court purporting to determine without evidence cause No. 87,402, this court's attention is respectfully invited to the following admitted excerpt from the record at pre-trial: (See Respondent Aetna's brief, page 36)

> "Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?
>
> "The Court: Yes, I think I am.
>
> "Mr. Glenn O. Young: And specifically denied it?
>
> "The Court: I think I am aware of that."

The basis of the Court's two injunctions is further revealed by a statement from the record, quoted by Aetna in its brief, page 37, as follows:

> "The Court: The court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicata.*"

Thus it will be noted from the record that *only at the time of judgment was petitioner informed that res adjudicata was considered an issue* or *relevant to any issue* pending in either case in the federal court.

Since the theory was advanced by the pre-trial judge *sua sponte*, appellants had no oportunity to defend against such a plea, either by pleading or evidence.

> "An issue must have been decided before it can come within scope of *res adjudicata.*" *Pierce v. Kimbell*, 151 F. 2d 897, certiorari denied 66 S. Ct. 821, 327 U. S. 793, 90 L. Ed. 1020."

"The doctrine of '*res judicata*' is that a final judgment of a court of competent jurisdiction upon a matter properly before it concludes the parties in a subsequent action or proceeding." *Huddleston* v. *Ingyr*, 137 F. 2d 383, vacated 64 S. Ct. 1175, 322 U. S. 232, 88 L. Ed. 1246.

"A decision, findings of fact and conclusions of law are the basis on which judgment of court rests." *Lamboss* v. *Young*, 145 F. 2d 341; 79 U. S. App. D. C. 274.

"In the absence of notice to a party of claim made against him and of a hearing or opportunity to be heard in opposition thereto, a judgment entered upon a claim is a nullity." *Sylvan Beach* v. *Kock*, 140 F. 2d 852.

In adopting the *res judicata* theory to prevent trial of 87,402, the pre-trial judge disregarded the settled law that if *res judicata* had any pertinency to the proceedings in this case whatever, by it the court below was precluded from granting a second injunction against this appellant and in favor of Aetna and Pence. The identical relief had been granted already in a companion case not only decided that date but as part and parcel of that very proceeding.

"The general rule of *res judicata* applies to repetitious suits involving the same cause of action and rests upon consideration of economy of judicial time and public policy favoring establishment of certainty in legal relations." *C. I. R.* v. *Sunnen*, 68 S. Ct. 715, 333 U. S. 51, 92 L. Ed. 898

"Purpose of the principle of *res judicata* is to end litigation, the theory being that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate." *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d

464, certiorari denied 71 S. Ct. 743, 341 U. S. 921, 95 L. Ed. 1355.

The iniquity of permitting a litigant to claim the identical relief in two separate and distinct law suits instituted for the same object is most obvious in a case such as that at bar. To free himself from either injunction, the petitioner must successfully prosecute, not *one*, but *two* appeals with the consequent expense of attorneys' fees, printing bills, court costs, etc., etc. Paradoxically both Aetna's suits were premised upon its demonstrably fallacious contention that failure of the U. S. Court to permit both interpleader and a declaratory judgment suit for the same relief might subject it to duplicitous claims upon a single liability.

Once the practice of permitting entry by the same court on the same day of two different injunctions for the same purpose in two separate lawsuits, is approved, may it not reasonably follow that to really make costs of an appeal prohibitive even more, say four or six might be approved in other cases?

If the first injunction entered was firm and sound, after all what was the need of the second? Was the purpose of Aetna, Pence and Company based upon an assumption that if they missed Fleming with the broad-ax, they might perchance still smite him dead with the sword? If the purpose of some four years legal jujitsu in the Northern District has been to avoid involving *Aetna* in duplicitous lawsuits how much simpler the object might have been obtained by merely dismissing its wholly fictitious and unfounded

claims that *disagreements existed among beneficiaries under its incontestable policy contract*, thereby requiring it and its confederates in the federal court to defend cause No. 87402 in the court where that suit is still pending?

Irrespective of the issues here, matters of attorneys' fees, costs, etc., as well as claims for both actual and punitive damages remain undisposed of in 87402. Of $191,864.64 worth of bonds converted, only $25,143.05 could possibly have found its way into any policy contract in which this petitioner was interested or a party.

In the long course of this litigation Fleming has been a most reluctant and unwilling gladiator in a judicial arena against an amazingly large number of brilliant, versatile and resourceful lawyers. No one of them ever volunteered the suggestion that the issues in 87402 were *res adjudicata* or that at pre-trial, when the summary injunctions were entered, the case was "ripe for judgment."

While it is not germain to the issue here, the suggestion is respectfully advanced that upon the whole record Aetna and its confederates, if they had a good defense against the claim asserted by this appellant in cause No. 87402, have certainly gone to most extraordinary labor, trouble and expense to avoid revealing it forthrightly in any court and defending it in the only court where that claim has ever been asserted. The charge that Aetna and interveners wrongfully converted on October 31, 1950, bonds from the private safe deposit box of an aged and incapacitated and incompetent old woman made in 87402 was not denied in the cases here. That issue has never been tried in any court.

Involved is the undetermined legal question of whether *one who wrongfully converts funds of another, may absolve himself from all liability by the simple process of investing part of the money in an insurance contract payable to himself.*

Every consideration of sound public policy seems to support the right of this appellant to his day in court with at least the opportunity to try his lawsuit where it is still pending without risk of being committed for contempt.

Opinion of Tenth Circuit in Conflict with *Lowther* v. *New York Life Ins. Co.*, 278 Fed. 405.

In denying, without comment, that the decision in the case at bar is in conflict with the *Lowther* case, respondent Aetna overlooks and disregards the basis upon which the Lowther case was premised. The *Lowther* case followed *Wells, Fargo & Co.* v. *Taylor*, 254 U. S. 183, 41 Sup. Ct. 93, 65 L. ed. 205, by this Court, wherein the power of the federal court to enjoin actions previously instituted in a state court of competent jurisdiction, was denied upon the ground that "it tends to prevent unseemly interference with orderly disposal of litigation in the state courts and is salutary."

There is nothing in the Interpleader Acts which evidences an intent of the Congress to alter salutary and wholesome public policy established by this Court itself, or to invite litigants to use interpleader in federal courts as a ruse, pretext and excuse for invading the prior jurisdiction of state courts in pending cases, not to hear and determine issues upon pleadings and evidence, but to en-

litigation without due process of law by merely enjoining further prosecution of it.

A further issue is whether the federal court, even if it might lawfully enjoin petitioner once, had authority to enter another and different injunction granting the same relief to the same party, all without any evidence or pleadings. Neither pleadings or evidence or the briefs of either respondent establish that:

1. Aetna had a cause of action for interpleader warranting exercise of jurisdiction by the U. S. District Court, or,
2. That the interveners, or either of them, had a cause of action for interpleader or any other relief within the jurisdiction of the federal court.

Absent some showing by pleadings or evidence of the existence of a cause of action in the nature of interpleader against this petitioner in either case, it is clear legislation subsequent to the *Lowther* case could not alter the salutary rule it announced.

The decision of the Tenth Circuit not only conflicts with the *Lowther* case; it is contrary to the decision of this Court upon which the *Lowther* case is based.

Conclusion.

The issue here, as clearly revealed by the record, transcends, however, any question of conflicting federal or state jurisdiction.

The record discloses, and unequivocally, that the petitioner, Donald George Fleming, having in due course instituted in the District Court of Tulsa County, Oklahoma, cause No. 87402, to recover damages for a wrongful entry into the private safety deposit box of his great aunt, under whose will he was legatee, and the removal and conversion of U. S. Bonds, worth $191,864.64, has been twice enjoined from the prosecution of said suit by the U. S. District Court for the Northern District of Oklahoma.

Each injunction was issued at a pre-trial conference.

The record clearly discloses that the pre-trial judge expressly recognized that no issues were raised by any pleadings in the federal court concerning the merits of cause No. 87402. No evidence was offered. No trial was had.

The Tenth Circuit Court of Appeals (although recognizing a conflict between its decision and the *Louther* case by the Third Circuit) obscured the controlling issues and attempted loosely to justify the injunction complained of upon the ground of subsequent legislation governing interpleader. No effort was made to show in what manner this legislation altered the basic and salutary policies enunciated by this, the Supreme Court of the United States, and followed in the Third Circuit.

Issuance of two injunctions under the circumstances constitutes abuse and misuse of judicial authority, denial of all the essentials of due process of law and such wide departure from the usual and ordinary judicial processes as in the considered opinion of the undersigned to warrant this Honorable Court in issuance of its Writ of Certiorari.

Respectfully submitted,

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